STATE OF MICHIGAN

COURT OF APPEALS

EJS PROPERTIES LLC,

Plaintiff-Appellant,

v

RICHARD FERGUSON and JUDY FERGUSON,

Defendants-Appellees.

UNPUBLISHED
February 12, 2004

No. 242490
Ingham Circuit Court
LC No. 02-000610-CH

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

In this contract case involving the sale of real property, plaintiff appeals as of right a judgment for defendants. We affirm.

I. Facts and Procedure

Defendants owned Grove Park Apartments in Lansing and listed it for sale. Erich Speckin, owner of plaintiff corporation, made an offer to buy the property and sent defendants a proposed purchase agreement. Defendant Richard Ferguson made several handwritten changes to the proposed purchase agreement, including changing the cash due at closing from $1,500,000 to $1,480,000, inserting a provision reading, "$20,000 deposit upon acceptance," and changing the closing date to "on or before March 3, 2002." Ferguson then signed the modified agreement and sent it back to Speckin. Speckin signed and initialed the document, wrote "I will get you a clean typed version when I get back," and sent it back to defendants on January 9, 2002, without a $20,000 deposit.

On January 20, 2002, Speckin had a physical inspection of the property conducted. After the inspection, Speckin sent a letter to defendants' broker, Jeffrey Blanton, requesting an additional $20,000 credit at closing for repairs and stating that he would waive the inspection contingency and make the $20,000 deposit after he received tax returns and verifiable deposit information from defendants. On January 25, 2002, Speckin received the financial information he had requested from defendants, but did not pay the $20,000 deposit. Ferguson testified that Speckin had promised to pay the deposit after he received the financial information on January 25, 2002. On January 29, 2002, after defendants did not receive the deposit, they cancelled their listing agreement with the realtor, so they could refinance the property. On February 4, 2002, defendants accepted another offer to purchase Grove Park Apartments. Meanwhile, plaintiff, who did not know that defendants had accepted another offer to sell the property, obtained

financing and proceeded toward closing. In late February 2002, Speckin learned of defendants' acceptance of the other offer to purchase the property, but waited to see what would happen with the other offer before withdrawing plaintiff's offer. Sometime after March 10, 2002, defendants told Speckin that plaintiff could not purchase the property.

Plaintiff filed a complaint against defendants, alleging breach of contract and requesting specific performance. Following a bench trial, the trial court determined that the contract was conditional upon certain factors, one of which was the payment of the $20,000 deposit. The trial court concluded that, because plaintiff had not paid the deposit, he had not satisfied one of the conditions and there was not "a clear and concise agreement binding everybody." The trial court entered a judgment for defendants.

II. Analysis

Plaintiff argues that, because the contract was signed by both parties and contained the material terms of a contract for the sale of land, the trial court erred in determining that the contract was invalid. In response, defendants argue that the contract was invalid, because plaintiff did not accept defendants' counteroffer in conformance with its terms. We agree with defendants. The interpretation of a contract is a question of law that is reviewed de novo on appeal. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

"Before a contract can be completed, there must be an offer and acceptance. Unless an acceptance is unambiguous and in strict conformance with the offer, no contract is formed." *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995). Here, the first question is whether defendants' response to plaintiff's purchase agreement offer constituted an acceptance or a counteroffer. "For a response to an offer to be deemed an acceptance as opposed to a counteroffer, the material terms of the agreement cannot be altered." *Zurcher v Herveat*, 238 Mich App 267, 296; 605 NW2d 329 (1999). The material terms of the contract which must be established before an agreement becomes enforceable are the identification of the property, the parties, and the consideration. *Id.* at 290-291, 296 n 15, citing *Brotman v Roelofs*, 70 Mich App 719, 726-727; 246 NW2d 368 (1976). In a bench trial, whether a term of a contract is material is a question of fact. *Id.* at 289-290, 298, citing *Giannetti v Cornillie*, 447 Mich 998; 525 NW2d 459 (1994), adopting the dissent of then Judge Taylor in *Giannetti v Cornillie*, 204 Mich App 234, 239-241; 514 NW2d 221 (1994) (Taylor, J., dissenting). In the present case, even if defendants' modifications of the purchase agreement did not affect any material terms of the offer, the modifications made it clear that defendants were submitting a counteroffer, rather than accepting plaintiff's offer. That defendants wrote "$20,000 deposit *upon acceptance*" (emphasis added) indicates that plaintiff's acceptance of defendants' modifications was required for the contract to be valid.

Plaintiff argues that the deposit provision added to the purchase agreement by defendants was merely a customary contingency that did not affect the validity of the contract. Plaintiff cites *Greenberg v Sakwinski*, 211 Mich 498, 505; 179 NW2d 234 (1920), where our Supreme Court held that a party's acceptance of a contract containing a contingency that is disadvantageous to him does not impair the validity of the contract. In contracts, what is generally meant by conditions are conditions that become operative after formation of the contract and qualify performance—not conditions that qualify the existence of a contract. *Modern Globe, Inc v 1425 Lake Drive Corp*, 340 Mich 663, 668; 66 NW2d 92 (1954). Plaintiff

is correct that the presence of a contingency in a contract does not render it invalid. However, the deposit provision in this case was not a contract contingency, but was a condition of acceptance that was part of a counteroffer. In order for a contract to be formed, the acceptance must be unambiguous and in strict conformance with the offer. *Pakideh, supra* at 640.

Plaintiff argues that this case is governed by *Brotman v Roelofs*, 70 Mich App 719, 726-727; 246 NW2d 368 (1976). In *Brotman, supra* at 722, the contract for a purchase of land contained a provision stating that the purchase offer was subject to a favorable zoning variance decision. The variance was denied. *Id.* When the sellers attempted to secure a release from the buyer so they could sell the property to another party, the buyer stated that he still wanted to buy the property, notwithstanding the zoning decision. *Id.* at 722-723. The sellers refused to sell the property to the buyers. *Id.* at 723. This Court held that, because the zoning variance provision was included to protect the buyer's interests in the property, rather than the sellers' interests, the buyer was permitted to waive the provision and the contract was valid. *Id.* at 726. The present case is distinguishable from *Brotman* because the deposit provision was not for plaintiff's benefit, but was for defendants' benefit. Therefore, plaintiff was not free to waive the deposit provision, as the buyer in *Brotman* was free to waive the zoning provision.

We conclude that the present case is more similar to *Pakideh, supra* than *Brotman, supra*. In *Pakideh, supra* at 637-638, the defendant's offer contained a provision that the offer would expire if the plaintiff did not sign and return the commitment letter by December 16, 1987. The plaintiff never signed or returned the letter, but paid the defendant a $52,500 deposit after December 16, 1987. *Id.* at 638. This Court stated that "[t]he specificity of the requirements set out in the letter compel a finding that defendant intended those requirements to be the exclusive means of accepting the offer." *Id.* at 640. This Court held that, because the plaintiff did not sign and return the commitment letter, he did not comply with the unambiguous terms of acceptance and a valid contract was never formed. *Id.* Similarly, in the present case, defendants' counteroffer unambiguously required plaintiff to pay a $20,000 deposit upon acceptance. It is undisputed that plaintiff *never* paid the deposit. Because plaintiff's acceptance was not made in accordance with the express terms of defendant's counteroffer, a valid contract was never formed.

Affirmed.[1]

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper

[1] In light of our disposition above, we need not address plaintiff's other argument on appeal.